BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

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Order Instituting Investigation And Order to Show Cause on the Commission's Own Motion into the Operations and Practices of Pacific Gas and Electric Company with Respect to Facilities Records for its Natural Gas Distribution System Pipelines.	Investigation 14-11-008 (Filed November 20, 2014)

CITY OF CARMEL-BY-THE-SEA REPLY BRIEF

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CITY OF CARMEL-BY-THE-SEA REPLY BRIEF

I. INTRODUCTION

City of Carmel-by-the-Sea (Carmel) respectfully submits this reply brief to respond to the other parties' opening briefs filed February 26, 2016. Carmel supports the Safety and Enforcement Division's (SED) arguments submitted in its opening brief, believes that SED has sustained its burden of proof, and urges the California Public Utilities Commission (Commission) to adopt SED's legal and factual analysis and Carmel's proposed fines and remedies against Pacific Gas and Electric Company (PG&E).

PG&E's opening brief, on the other hand, shows a corporation neither contrite nor remorseful, not understanding the consequences of its actions. The utility believes that it can blow up homes and wreak havoc in communities with impunity because it oversees a massive pipeline distribution system that overall seems to work fine on most days with no reportable incidents. It also believes it complies with federal regulations because the law does not require "perfection" and therefore PG&E may rely on any records it believes are reasonably available. This argument depends on PG&E's overall low error rate, so when errors do occur, it should not be punished. The fallacy of PG&E's argument is a clear and present danger to public safety; giving its welders the nearest available map without further due diligence will eventually cause gas leaks, including explosions, regardless of a low error rate. Should the Commission agree

with PG&E's argument, it would set a dangerously low threshold for gas distribution pipeline recordkeeping compliance. This proceeding would thus have no lasting value, because it will not effectuate the Commission's desired deterrence and improved recordkeeping practices not just for PG&E but for all utilities in this state.

II. PG&E'S OPENING BRIEF DISREGARDS ITS OBLIGATION TO MAINTAIN A SAFE GAS DISTRIBUTION SYSTEM.

Carmel finds the following shortcomings in PG&E's arguments.

A. Fallacy #1: A Low Error Rate Means the Gas Distribution System is Safe.

PG&E finds fault in this Order Instituting Investigation (OII) and SED's focus on just 19 "isolated" incidents. PG&E argues that these incidents do not reflect the safety of the miles and miles of PG&E's gas distribution system, because the sampling is so small.[1] PG&E notes that these events amount to just 0.001% of its two million USA dig tickets within the past six years and PG&E is at the forefront in safety measures nationally.[2] According to PG&E, the Commission thus cannot make any conclusions about the safety of its system by focusing on just a small set of incidents.[3]

This argument incorrectly assumes that these 19 events are the only instances where PG&E's maps were in error. PG&E wants the Commission to believe that there have been no other recordkeeping issues beyond the 19 incidents, because no other similar reportable incidents occurred. This ignores PG&E's prior admission that: "plat map errors are found throughout its service territory.[4] Not all mapping errors result in a reportable gas leak. These 19 incidents at issue only reflect events where PG&E was required by law to report its mapping errors to the

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[1] PG&E Brief at 10.

[2] *Id.* at 1, 14.

[3] *Id.* at 1, 15. PG&E is playing a statistical game with safety. Just because the incidents of failure is low when measured against the whole does not make its system "safe." Consider by analogy that in 2014, 848.4 million passengers flew on airline flights in the United States. (See http://www.rita.dot.gov/bts/press_releases/bts015_15.) A failure rate of .001% would equal 8,484 passengers per year involved in an accident. That is the equivalent of twenty Boeing 747s per year at an average capacity of 414 passengers per aircraft. Would anyone consider twenty airline crashes a year "safe?"

[4] OII at 2.

Commission.[5] PG&E presents no evidence that its maps and records were correct for all other dig ins or non-reportable incidents. It cannot. PG&E testified it has received over 14,500 Corrective Action Program (CAP) tickets in the past 2 years, with approximately one-third of those tickets (or 4,833) associated with mapping corrections, which includes mapping errors.[6] The 19 incidents addressed in this OII just scratch the surface of the mapping errors and mistakes about what is underground. How many other recordkeeping errors exist, to be discovered in the future by an unsuspecting worker with the wrong map?

PG&E's "big picture" point ignores the fact that critical recordkeeping errors will manifest themselves in individual incidents at a local level, which is why the Commission initiated this proceeding. PG&E's low error rate argument is better suited for settlement discussions or for the issuance of a lower fine. Had the home in Carmel been destroyed by an inattentive motorist texting while driving, the driver could seek a lower jail sentence by citing his good driving record. However, the driver cannot logically argue he is not at fault because of his good driving record. Neither can PG&E.

B. Fallacy #2: PG&E Did Not Fall Below the Standard of Care Because it Used Reasonably Available Records and Continues to Improve its Record Management.

PG&E argues that the applicable standard of care is: "reasonable compliance with the regulations and continuous improvement in its maps and records over time, based on the best available information."[7] PG&E thus did not fall below this standard of care, under its own definition of "reasonable." This standard provides no incentive for PG&E to diligently maintain and track records because PG&E can just simply rely on what's lying around and say the map

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[5] See e.g., attachment regarding six incidents to OII. For example, the Commission would have likely remained in the dark about the Mountain View incident, but for the fact that the news media came to the scene, requiring PG&E to report the incident to the Commission. (*Id.* at 17.)

[6] Transcript at 539:17-540:10 [PG&E was unable to provide a number on the amount of map changes related to errors, and stressed some mapping corrections are due to street name changes and other events. In factoring street name changes and "other events," there were still likely thousands of mapping errors that required correction which PG&E was not required to report to the Commission].

[7] PG&E Brief at 4, 31.

was reasonably available. Instead, the law requires more than "reasonable compliance" with federal regulations. The law – as well as PG&E's own retention protocol – require that PG&E diligently maintain its as built and service records for the life of a pipeline and to follow its protocol to make sure the data of those records is updated in its mapping.[8]

SED accurately characterizes PG&E's position as a "self-serving concept of relying on 'available information' which in practice offers an unearned indulgence for PG&E's volumes of missing records."[9] PG&E brushes its history under the rug: PG&E has known since at least 1984 that its records are "a mess" and has admitted to relying on divine intervention to understand what is underground.[10] The reasonable approach is for PG&E to verify the accuracy of the map, not just assume its correctness. PG&E touts its subsequent actions post-Carmel,[11] PG&E should have had already implemented these safeguards, given the serious potential consequences of working around an unknown live line. Its post-Carmel additional verification steps not only promote safety, but evidence the reasonableness of these procedures to comply with federal regulations. PG&E should not have waited for an explosion to understand the reasonableness of these actions.

C. Fallacy #3: PG&E Complied With its Proffered Low Standard of Care Approach in Carmel.

PG&E quotes from its experts who claim that the legal standard of care only requires "operators to undertake 'reasonable effort' to gather 'reasonably available information' through their 'normal activities and maintaining' their pipelines."[12] As explained above, PG&E fell below the standard of care because it ignored the realities of its existing recordkeeping deficiencies. However, the real fallacy of its standard of care argument is that PG&E still fell

[8] 49 CFR § 192.605(b); General Orders 58A and 112E at § 101.4; PWA Report at 31 (Ex. 1).

[9] SED Brief at 33.

[10] "God knows what is underground." – Brian Cherry in an October 11, 2010 email to CPUC's Paul Clanon and Frank Lindh; see also PWA Report at 11 (Ex 1).

[11] Exhibit A to PG&E's Brief.

[12] PG&E Brief at 35-36.

below this standard in Carmel despite its recent experience with Mountain View. After the Mountain View incident, PG&E possessed key information about the risks of unmapped plastic inserts. At its fingertips was its own recommendation to apply additional safeguards to prevent future incidents. PG&E possessed data showing that its distribution system contained miles upon miles of plastic inserts. This information was reasonably available, however, PG&E failed to take any measures to use this information when it arrived in Carmel on March 3, 2014. PG&E is correct in that it should have done more in Carmel;[13] it also fell below an already low internal standard.

D. Fallacy #4: PG&E Can Reply on Expert Testimony Instead of Commission Precedent to Interpret Public Utilities Code Section 451.

SED's brief demonstrates that PG&E failed to maintain its facilities in a safe manner in Carmel and other locations at issue, in violation of Section 451.[14] The Commission's four San Bruno decisions last year make the law crystal clear: Section 451 is a standalone safety obligation and cannot be treated as a mere "safety goal" or ratemaking statute. PG&E never cited to any decisions or law of this Commission to support its purported compliance with Section 451's requirement to maintain a safe gas pipeline in Carmel and the other locations. This Commission has held that Section 451 is "clear and unambiguous," but PG&E refuses to be bound by it.

Instead, the utility opted to cite to its own experts' testimony to show that no Section 451 violation occurred.[15] PG&E's expert Mr. Huriaux admitted he has never testified as a recordkeeping expert, is not a lawyer, did no research on Section 451, was told by PG&E's attorneys that his opinions were contrary to Commission precedent, and qualified all his opinions

[13] Transcript at 317:19-318:13.

[14] SED Brief at 20-26 (all further statutory references are to the Public Utilities Code, unless stated otherwise).

[15] PG&E Brief at 31-32.

regarding Section 451 by stating he "offered no legal opinion" on the issue.[16] In sum, Mr. Huriaux himself admits he is unqualified to render an opinion on this statute. Regardless, PG&E cited heavily to his testimony to demonstrate that it complied with Section 451.[17] There is neither a reasonable nor ethical justification for PG&E's reliance on an opinion woefully out of step with California law.

PG&E also suggests that the Commission should ignore prior decisions and adopt PG&E's own watered-down legal interpretation of Section 451. "A sound and workable approach to applying section 451 to the recordkeeping issues presented would be to incorporate the relevant standards contained in the federal pipeline safety regulations that PHMSA has developed over many years[.]"[18] This position is knowingly contrary to Commission precedent.[19] PG&E's proposed interpretation furthermore wishes to render Section 451 meaningless by having PHMSA and federal regulations take its place, to which PG&E is already bound.

This approach is also disrespectful to the Commission, Commission authority, and the competence of Commission decision-makers. PG&E admits that the Commission has held that Section 451 applies to safety standards, but implies that the Commission got it wrong and urges a new legal standard. Specifically, PG&E states "[t]he Commission has held that section 451 [ ] embodies an overarching requirement that a pipeline operator must 'at all times maintain safe facilities and operations.'" But then PG&E discredits this ruling by citing to its expert who calls

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[16] Transcript at 583:21-584:9, 586:25-589:3 ["[I]t was my opinion and that I was not opining on what the Commission had [already] ruled upon. Obviously."] *But see* D.15-04-021 at 48-56; D.15-04-022 at 57-59; D.15-04-023 at 23-37, D.15-04-024 at 190-191.

[17] PG&E Brief at 30-33.

[18] *Id.* at 32.

[19] D.15-04-021 at 57-66 [holding PG&E in violation of Section 451 due to its deficient recordkeeping practices in the San Bruno pipeline explosion].

the statute a "safety goal, [that] contains no specific standards or objections against which an operator's performance can be measured."[20] PG&E's brief belittles any discussion about the power of Section 451 by refusing to call it law, and instead reduces it to statement that the Commission has so ruled as to its power. Commission decisions are binding legal authority. The subtle remarks are intentional and should not be overlooked. PG&E's choice of words reflects that it does not respect the decisions of this Commission. These actions not only support a higher fine against the utility, but also support a finding of Rule 1.1 violations as addressed in Carmel's opening brief.[21]

E. Fallacy #5: The Commission Cannot Infer a Mistake in Procedure Through an Incorrect Map.

PG&E claims that SED has not met its burden of proof because there is no evidence PG&E failed to follow procedure.[22] Specifically, PG&E claims SED cannot ask the Commission, when assessing compliance with federal regulations, to make the "inferential leap" that an inaccurate record evidences that procedure was not followed when the record was created.[23] On the contrary, the Commission can make such an inference. The Evidence Code defines inference as a: "deduction of fact that may logically and reasonably be made from another fact or group of facts found or otherwise established in the action."[24] "[A]n inference is not evidence but rather the result of reasoning from evidence [and] must be based upon

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[20] PG&E Brief at 31 (citations omitted); *see also Id.* at 4 "[PG&E's proposed standard of care] is consistent with federal regulations and provides specific guidelines for implementing the broad safety mandate the Commission has held is embodied in [Section 451.]"].

[21] Carmel Brief at 14-17.

[22] PG&E Brief at 43.

[23] *Id.* at 44.

[24] Evid. Code § 600(b).

substantial evidence, not conjecture."[25] PG&E is required to possess accurate maps for its pipelines. PG&E has written procedures, for both in the field and in its mapping department, to make sure that all work done to its pipelines is accurately reflected and updated in its maps. It is undisputed that PG&E's maps were incorrect for the events at issue. The Commission can thus logically infer from the evidence that PG&E's procedures were not followed when an erroneous map contributes to a gas leak. PG&E cites no legal authority to overcome this evidentiary inference. A map should be accurate, especially maps of pipes carrying an explosive substance into customers' homes.

F. Fallacy #6: The Commission Cannot Assume PG&E Meant What it Said in its Writings to SED.

Facts recited in a written instrument are conclusively presumed to be true.[26] A person is also presumed to intend the consequences of his voluntary act.[27] PG&E's brief argues that these evidentiary maxims do not apply to the corporation.

PG&E claims that its Vice President of Gas Asset and Risk Management, Sumeet Singh, did not really mean what he meant when he wrote to its regulator and admitted PG&E violated the law in Mountain View (for the exact same violation that caused the Carmel house explosion: unmapped plastic inserts) because he "had not so concluded in his mind."[28] PG&E's brief asks the Commission to ignore its written admission, because its vice president did not really mean it and PG&E did not perform a full causal analysis.[29] Put another way, PG&E is telling the Commission that it was untruthful in its letter.

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[25] *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1149 (citations omitted).

[26] Evid. Code § 622.

[27] Evid. Code § 665.

[28] PG&E Brief at 49.

[29] *Id.* at 49-50.

Carmel's Opening Brief argued that Mr. Singh's testimony violates Rule 1.1.[30] Now PG&E embraces Mr. Singh's contradictory statements. If the Commission is to accept Mr. Singh's logic, that in his mind he did not really mean to admit fault because the company was focused on its oft-quoted mantra "moving forward," then the Commission would not be able to take any of PG&E's communications as truthful. PG&E is so determined to deny liability in this proceeding that it prefers to jeopardize future communications with the Commission rather than admit fault. The Commission cannot trust any of PG&E's future correspondences if it is to believe this argument. Fortunately, the Evidence Code places PG&E's writings to a higher standard.

G. Fallacy #7: PG&E Should not be Fined (or Should be Fined Less) Because PG&E Already Paid $10.85 Million in Penalties for the Carmel Explosion.

PG&E's brief references at least twice that it already paid $10.85 million in penalties issued by SED for the Carmel explosion,[31] in an apparent attempt to show it has already paid for its crimes. Not so. This prior fine has nothing to do with PG&E's recordkeeping. The Commission fined PG&E due to its failure to follow emergency response protocol in Carmel and PG&E's appeal of the fine made clear PG&E understood and admitted the fine did not relate to recordkeeping requirements.[32] The Commission can disregard PG&E's comments about unrelated penalties.

III. CONCLUSION

When this OII was opened, the Commission already explained that the six SED Incident Investigation Reports revealed a "strong showing that PG&E may have violated the applicable

[30] Carmel Brief at 14-15.

[31] PG&E Brief at 2, 53.

[32] See Citation No. ALJ-274 dated November 20, 2014; PG&E's Appeal of Citation No. ALJ-274 dated December 1, 2014, attachment at 2, fn 5.

law."[33] While PG&E dragged out this proceeding and expended Commission resources, in the end it presented no evidence to overcome that presumption identified on the first day of this OII. PG&E should be punished for its wrongdoings in Carmel and the other effected cities, not just for the events themselves, but for the fact that PG&E still refuses to admit fault. Its denials are so adamant that it would prefer to disown its prior writings to the Commission and rely on experts admittedly unqualified to discuss that legal point. PG&E should also be fined for its disrespect of and misrepresentations to the Commission identified above and in Carmel's opening brief. Carmel supports the remedies proposed by SED and urges the Commission to adopt the fines and remedies identified in Carmel's opening brief.

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Respectfully Submitted,

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[33] OII at 7.